NO. 2695

In the United States
Circuit Court of Appeals
For the Ninth Circuit

JOHN MacAULAY,

Plaintiff in Error.

vs.

ALASKA GASTINEAU MINING CO.,
A CORPORATION,

Defendant in Error.

Brief for the Plaintiff in Error

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF ALASKA, DIVISION NUMBER 1.

J. H. COBB,
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STATEMENT OF THE CASE

This is an action for personal injuries brought by the Plaintiff in Error against the Defendant in Error. The plaintiff was an employee of the defendant at work at the time of the accident complained of in its underground mines near Juneau, Alaska. The accident occurred on the 13th day of March, 1914. About an hour prior to the accident the plaintiff was directed by the defendant to proceed to the foot of an upraise then being driven from the No. 10 level and assist some other employees there in taking some ladders into the upraise. The plaintiff had never been at this particular place before and knew nothing of the conditions there. He had been at work approximately an hour when a large rock fell down from the upraise, broke his leg and seriously injured him.

The negligence alleged was that the defendant unknown to the plaintiff had a force of men at work blasting in the workings above said raise only a short time before the plaintiff was put to work therein and that the defendant, its servants and employees, negligently failed to properly bar down and remove the rock loosened by the blasting so that there would

be no falling of rock down said raise where the men were put to work, and that the defendant, its servants and employees, failed and neglected to make the place safe against loose rock liable to come down and injure the employees where plaintiff was put to work before directing the plaintiff to work therein, and the defendant, its servants and employees was negligent in failing to bar down the rock and in failing to see that said place was safe against falling and loosened rock from the workings above before directing the plaintiff to go to work at that place.

The defenses plead, were, first; denials; second; that the accident and injury to plaintiff was one of the usual, ordinary, and assumed risks of his employment; third; a release, compromise, and settlement of the damages claimed.

At the conclusion of the testimony the case was taken from the jury and a verdict instructed for the defendant as follows: "When an employee sues an employer for damages caused by alleged negligence, he must show that the employer is negligent and be able to put his finger on the point where the employer was negligent. Unless he does show that, it is the law that he cannot recover. In other words, the mere fact that a man is hurt in a mine or anywhere else, except in certain special cases, is not proof that the person who employed him injured him by his negligence; and in this case the court will instruct you as a matter of law that there has not been proof of

negligence of the defendant, and it is therefore your duty to return a verdict in favor of the defendant."

To this ruling of the Court the plaintiff excepted. A verdict was accordingly returned for the defendant.

The sole error assigned and presented upon this record is as follows: "The Court erred in instructing the jury to return a verdict for the defendant at the end of the testimony."

The testimony for the plaintiff tended to prove the following facts:

The defendant, among other mining operations, was having an upraise driven from the No. 10 level. On the day of the accident the upraise had progressed to a point from 60 to 75 feet above the level. The method of conducting the work was as follows: About 50 feet below the face or upper end of the upraise an intermediate drift was cut in the side of the upraise in which ladders, tools etc., were kept for the use of the men at work therein. Two shifts were at work on the upraise. The last work done by each shift was to blast in the face of the upraise. Each blast broke down from 5 to 7 feet of rock,—that is, advanced the upraise that much. The effect of the blast was to leave the upper end of the upraise in an exceedingly dangerous condition from loose and shattered rock caused by the blast and the first duty of the machine man on the next shift was to go up into the upraise on ladders prepared and furnished for that purpose and bar down this loose rock

so as to make the place safe. On the day of the accident blasting was had in the face of the upraise as usual by the day shift. When the night shift came on they attempted to bar down the loose rock in the upraise but because of an insufficient supply of ladders they were unable to reach within 10 or 15 feet of the upper end of the upraise, and this portion was not barred down..

The plaintiff had never before this particular day been at work in said upraise and knew nothing of the conditions there, but was working in another part of the mine, on the night shift. He had been at work about an hour on this day when he was ordered by the mine foreman to proceed to this upraise in the No. 10 level and assist the men there in getting more ladders into the upraise. In obedience to these instructions he went to the upraise and ascended by the man-way to the intermediate drift. At this point a bulkhead had been constructed in the upraise, which bulkhead was covered with loose and broken rock from the last blast and the rock that had been barred down in the lower part of the upraise above, and the plaintiff was directed to remove this muck or broken rock preparatory to hoisting the ladders. While engaged in this work, a piece of broken rock fell down the upraise and broke his leg, seriously injuring him.

The evidence of Otie Wilcox and P. J. Poletti showed clearly the method in which the work was carried on, that it was their duty to bar down the

loose rock to make the place safe immediately upon coming on shift; that they came on shift about an hour before the accident and attempted to perform this duty but were unable to bar down the last 10 or 15 feet of the upper end of the upraise because there were not sufficient ladders on hand and they could not reach that portion of the upraise. The plaintiff testified that he had never before been at this particular place and knew nothing of the conditions there when he was ordered to go to work at the point where he was injured.

There was no serious conflict in the evidence as to the above facts, but none of the witnesses knew just what part of the upraise the rock that struck the plaintiff fell from, whether it was from the part that had been barred down by Wilcox and Poletti or from that portion of the upraise which had not been barred down or made safe.

Mr. Wilcox was also called as a witness for the defense and testified among other things as follows:

> "When first going on shift the first thing we were supposed to do was to bar down to make it safe, cleaning the ladders as we went up. After blasting muck and rock lodged among the ladder rungs. These ladders are close to the foot wall and muck and rock would lodge on the rungs; we would clean them off as we went along—worked our way up to the top of the ladder, barring down anything we saw that

was loose; then we would put up our stulls—usually use 4x6's.

Q. Where did you put those?

A. In the ends of the raise, we cut hitches—what we call hitches—and use wedges—wedge one or both ends to make them tight and solid; then we use 2″ plank, 2 x 12——

Q. About how far below the top of the raise did they put those stulls?

A. 6 or 7 feet ordinarily.

Q. And does the ladder have to go up that far, or when do you put the ladders up that far?

A. Well, yes; we put in this staging for machines.

Q. And then from this staging you start clearing off the face, or do you drill the holes?

A. We drill the holes—that is we get our machines and start to drill holes and when we get through drilling we blast.

Q. When you get through drilling, what do you do?

A. Put away our tools—put them where they won't be damaged by rock any at least,—at least we put them in as safe a place as we have; put machines away where they won't be broken; then cut fuse. Quite frequently, if conditions are such that we can, we take away the 2″ plank, if not— —

Q. And you usually do that do you?

A. Yes.

Q. Mr. Wilcox, just one question—Is it neces-

sary to have those ladders clear up to those stulls in order to be on there and do your drilling—to put up that staging you stand on?

A. Is it necessary?

Q. The ladders have to go to these stulls in order to get in a staging and go ahead with the work?

A. The ordinary way of doing it."

The witness further explained that the ladders have to go up to the stulls in order to get on them to do the drilling and that after the blasting is done from 5 to 7 feet of rock is broken down, and the witness further testified that the method of driving the upraise was in a miner-like ordinary way. On cross-examination the witness stated that they were taking up four ladders that day, that they were going to use only one as a means to bar down the upraise, that that was all that was necessary to reach the face of the upraise, so that they could bar it down, and that the others would be stored in the intermediate drift for use as the upraise progressed and that it was the lack of these ladders that made it necessary to do the work in which MacAulay was engeged before barring down and making the upraise safe.

Fred Riddel, a shift boss, testified for the defense that he gave the orders for MacAulay, the plaintiff, to proceed and go to work at the point where he was injured and assist in getting ladders up; that he was not present at the time of the accident but went up as soon as he heard of it a few moments thereafter. This witness testified also that

the upraise was being driven in a miner-like way, the ordinary method of performing such work.

Mr. George T. Jackson, the superintendent of the mine was also called and testified as an expert that the upraise was done in a miner-like and careful manner.

Similar testimony as an expert was given by B. L. Neiding, James Joyce and B. L. Thane.

"And the above and foreging is all the evidence introduced on the trial bearing upon the question of negligence."

ARGUMENT.

The statuatory law applicable to this action is found in Chapter 45, Session laws of Alaska, 1913, which provides:

"Section I. That every person, association, or corporation engaged in the business of * * * * * * mining * * * * * * by means of machinery or mechanical appliances, shall be liable to any of its employees * * * * * * for all damages which may result from the negligence of any of its or his or their officers, agents or employees or by reason of any defect or insufficiency due to its or their negligence in the machinery, appliances, or works."

Section II. provides that contributory negligence shall not bar recovery and "all questions of negligence and contributory negligence shall be for the jury."

This statute is a substantial re-enactment of the Federal Employes' Liability Act of 1906, under

which it is immaterial whether the negligence which resulted in the plaintiff's injury was the negligence of the defendant or of any of its employees. But this question perhaps is not involved in the case, because the ruling of the court complained of is that there was no negligence shown by the evidence at all. It is this question then which we propose to briefly examine in the light of the authorities.

The witnesses all agree that the first thing to be done after a blast in the face of the upraise, was to bar down the rock loosened by the blast and left in the upraise in such an unstable condition that it is likely to fall at any time. This is the duty of the machine men, who are supposed to be skilled in that sort of work and are the only ones whose duties require them to assume that risk prior to the time the upraise is made reasonably safe by having this loose rock barred down. On the day of the accident, Poletti and Wilcox, the machine men, attempted to perform this duty, but were unable to reach the last 10 or 15 feet of the upraise because of want of ladders. The defendant, through its shift boss, directed the plaintiff then to go to work beneath this upraise in its unsafe condition, a condition of which the plaintiff knew nothing. It would seem that no argument was needed further than this statement of the facts which the testimony tended so strongly to prove. But it was argued before the Trial Court on the motion for a directed verdict (though the record does not show it, but we presume it will be urged

here) that because none of the witnesses knew what part of the upraise the rock that injured the plaintiff fell from, there was therefore no evidence to connect the negligence alleged and proved with the accident that caused the injury, and this was really the point upon which the Court based its ruling in directing the verdict. But in answer to this it is only necessary to say that the great probabilities, and this was a question for the jury, was that the rock came from the upper end of the upraise which had not been barred down, because the evidence showed that that was what was probable, and where it had been barred down there was no such probability of a rock falling. Of course in the nature of things there could be no direct evidence as to where the rock came from; but the jury had a right to infer from the fact that the rock did come down, that that was probably what would happen where the loose rock had not been barred down, and from the force with which it must have fallen to have done the damage it did, that it must have come from the upper end of the raise which had not been barred down. In short, the Court was of the opinion that the jury in this case were not at liberty to infer from the facts proved that the rock that injured the plaintiff fell from that part of the upraise that had been left unbarred because of the shortage of ladders, and that there was no causal connection shown between the negligence alleged and proved and the injury.

Said the Supreme Court of Utah in a case some-

what like the one at bar:

"Whenever it is a defendant's duty to keep premises in a proper condition as it respects persons passing, and these are out of condition and an accident happens, it is incumbent upon the defendant to show that he used that reasonable care and diligence which he was bound to use; and the absence of that care may fairly be presumed from the fact that there was the defect from which the accident had arisen." *Cunningham vs. U. P. Ry. Co.*, 7 Pac. 297.

That there was negligence in failing to have the upraise barred down and made safe or reasonably safe before putting the plaintiff to work at the place where he was injured and that this general negligence or failure of duty was due directly to the negligence in failing to have the ladders on hand, goes without saying almost—at least it was not disputed on the hearing in the Court below by the learned counsel for the defendant, but the point was urged and sustained that there was no connection between the negligence proved and the injury to the plaintiff because there was no testimony as to where the rock which struck the plaintiff came from, whether from that part of the upraise that had been barred down or from the part which had not been barred down.

We submit that this was manifest error, for a jury might have inferred, and would have been reasonably justified in inferring, that the rock fell from that part of the upraise which had not been barred

down,, and as bearing upon the question of inference of fact from facts proved which juries may draw, we call the attention of the court to a few cases.

The case of the Railway Company vs Jones, 192 Fed., beginning at Page 769, was an action for wrongful death; and turned upon the question as to whether or not the plaintiff's intestate, who was killed in a railway tunnel, was struck by a portion of the tunnel which was 15 inches lower than it was at other points, and which was the negligence alleged, or whether he was killed in some undisclosed manner which would leave the company not liable. The intestate for whose death the action was brought, was a brakeman and was on the top of the train when it entered the tunnel. The next day his body was found about 200 feet north of tunnel 24 on the east side of the track and about 2 feet from the ends of the ties. There was a large gash over his right eye extending along the side of his head. Signs of blood were found on a piece of wood lying in the middle and on the east side of tunnel 23 and also from the south end of that tunnel along the east side of the track to a point near the mouth of tunnel 24. Regarding this evidence Judge Warrington said: "The rational inference is that Winters' head struck the interior low portion of the tunnel roof. The first appearance of blood was discovered on the stick of wood found on the east side of the track at that place, and the fact that no sign of blood was found between that point and the end of the tunnel reasonably tend-

ed to show that the blood found on the stick of wood came from a spurt of blood caused by the stroke and that the rest trickled over the roof and finally fell to the ground as the car passed out of the tunnel."

Louisville & N. R. Co. vs. Bell, 206 Fed. 395, was an action for damages for wrongully destroying the plaintiff's tobacco factory by fire. There was no proof directly as to how the fire which burned the plaintiff's tobacco factory originated, whether by escaping from engines of the defendant as alleged, or by some other undisclosed means, and the case turned upon whether the jury were warranted in inferring from the facts proved that it was caused by the defendant's engines. "No one saw the spark enter the window and no one saw the kindling and first moments of the flames. Plaintiff depends wholly upon circumstantial evidence. This Court has considered that two things are essential to plaintiff's right to recovery: First, that the fire was set by such a spark; and; second: That the spark escaped through defendant's negligence * * * * * * Upon the first subject—whether the fire was set by a spark from the engine—plaintiff's evidence fairly tended to show these things in addition to those already stated; before any alarm had been given and while all other parts of the factory were free from smoke, several people noticed smoke coming from the window and from the roof just above it, then looking through the window they saw a small flame in the hanging tobacco just inside the window. There was

not then, and there had not been, any fire maintained in that room or in any part of the building from which smoke could have reached this point, and it was upon the side towards the wind. The fire occurred immediately after the noon hour, while most of the hands were busy. Employees had been, not long before, in the room in question, and there was then no fire there, and no one had entered the room after that time. The wind was blowing 30 miles an hour from the track towards the factory. An engine and freight train passed going up grade and laboring hard, just before the fire; the interval between the passing of the engine and the first observation of the fire being variously stated at from 5 to 15 minutes. As the engine passed a shower of cinders was heard to fall upon the roof of a wing of the factory which roof on the slope towards the witness was from 100 to 200 feet from the track. A pedestrian on the adjacent highway, who was waiting for this train to pass, at a distance from the track which he is unable to state and which from his testimony might have been anywhere from 75 to 150 feet (he thinks it was this maximum) and he was in the line between the engine and the factory, observed the laboring engine and heavy smoke and that a shower of cinders fell on him and that some of them were alive so that they burned his hat." The other facts stated was that the factory was about 225 feet from the track. The upper story was full of high grade tobacco hanging in frames and very combustible.

All the windows were open or removed. From these facts the inference was made by the jury that the fire was caused by the engine and the Court among other things said: "We have recently had occasion to examine and re-affirm the rule that while merely from equally balanced uncertainties the jury may not infer defendant's causal relation to plaintiff's injury, yet plaintiff's evidence need not exclude every other possible source of injury; it is enough if the inference of defendant's liability is fairly and reasonably probable and distinctly more probable than other suggested explanations."

So in the case at bar we may reasonably ask what would the average man of ordinary common sense and experience have said was the cause of the rock falling from the upraise, or what would he have said as to the place from which it came? Was there an equal balancing of probabilities that it came from that portion of the upraise that had been barred down prior to the accident, or from that part that had not been barred down? In short, would the jury under the evidence, have been justified in inferring that the rock fell from the upper end of the upraise which had not been barred down and that if it had been barred down the accident would not have happened?

We respectfuly submit that the evidence in this case proves negligence on the part of the defendant in failing to bar down the upraise before putting the plaintiff to work beneath where he was injured by

the falling rock; that the jury would have been justified in drawing the inference that the rock fell from that portion of the upraise which had not been barred down and was proximately due to the negligence of the defendant in the first instance. We respectfully submit that the case should be reversed and remanded with instructions to grant a new trial.

J. H. COBB,

Attorney for Plaintiff in Error.